Barre-National, Inc. *and* Freight Drivers and Helpers, Local Union No. 557, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 5–RC–14013

March 27, 1995

DECISION ON REVIEW AND ORDER REMANDING PROCEEDING TO REGIONAL DIRECTOR

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

On April 11, 1994, the Regional Director for Region 5 of the National Labor Relations Board issued a Decision and Direction of Election in the above-captioned proceeding in which he found appropriate a unit of the Employer's production, maintenance, and warehouse employees, and directed that 24 line and group leaders, who the Employer contended were statutory supervisors, be permitted to vote subject to challenge. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional director's decision, contending that the Regional Director erred by affirming the hearing officer's refusal to permit the Employer to introduce evidence at the preelection hearing concerning the leaders' supervisory status, and by ordering that resolution of the supervisory issue be deferred to the postelection challenge procedure, should the ballots of the disputed individuals be determinative of the election results. The Employer requested that the Board direct the Regional Director to reopen the preelection hearing for the purpose of fully litigating the supervisory status of the line and group leaders. Pursuant to the Board's normal procedures when a request for review is pending, the election was held as scheduled on May 6, 1994, and the ballots impounded.

By Order dated May 27, 1994, the Board granted the employer's Request for Review. Thereafter, the Employer filed a brief on review.[1]

On June 28, 1994, the Board scheduled oral argument for July 28, 1994, because this case and another case (*Angelica Healthcare Services Group*, 315 NLRB 1320 (1995)) presented important issues in the administration of the National Labor Relations Act. On the scheduled date, the General Counsel, the Employer, the Petitioner, the employer in *Angelica*, and various amici curiae[2] presented oral arguments. The General Counsel, the petitioner, and several of the amici curiae filed postargument briefs.[3]

On October 14, 1994, while this case was still under consideration, the Employer advised the Board that on October 3, the Employer had eliminated the line leader position entirely and that only one of the three group leader positions remained. The Employer argued that these developments did not ''resolve the issues pending before the Board,'' i.e., ''whether Barre was erroneously denied an opportunity to prove, at a pre-election hearing, that its Line Leaders and Group Leaders were supervisors under the Act.''

The Board has carefully considered the Regional Director's decision in light of the record, the request for review, the brief on review, the oral arguments, the postargument briefs, and the Employer's October 14, 1994 letter concerning the elimination of the contested positions. For the reasons set out below, we find that the Regional Director erred in refusing to permit the Employer to introduce the testimony of his witnesses at the scheduled preelection hearing; but in the present posture of this case, we have decided to direct the Regional Director to open and count the ballots, issue a tally of ballots, and thereafter entertain any objections to the election that are timely and properly filed by any party.

I. EVENTS PRECEDING THE ELECTION AND IMPOUNDMENT OF BALLOTS

The Petitioner sought a unit of all production, maintenance, and warehouse and distribution employees employed by the Employer, including all line leaders, but excluding office clericals, guards, and supervisors. The Employer and the Petitioner disagreed on the status of the Employer's 21 line leaders and 3 group leaders. The Petitioner maintained that they were eligible employees included in the unit; the Employer contended that they were supervisors as defined by Section 2(11) of the Act and should be excluded.

In accordance with normal procedures, the Regional Director issued a notice of hearing. On March 29, 1994, in accordance with the notice of hearing, the parties appeared before the hearing officer, accompanied by their intended witnesses. Before opening the record, the hearing officer questioned the parties and explored their positions on deferring resolution of the disputed individuals' supervisory status by using the Board's challenged ballot procedure. Upon the opening of the record, the parties stipulated to jurisdiction, labor organization status, appropriate unit, inclusion of the other petitioned-for employees, and the absence of a contract bar. The Petitioner accepted the use of the

[1] Members Stephens and Cohen would have stayed the election and remanded the matter for a hearing and a determination of the supervisory issues. Member Truesdale did not participate in ruling on the Employer's Request for Review.

[2] The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); the Chamber of Commerce of the United States of America (Chamber of Commerce); the Labor Policy Association; the Council on Labor Law Equality; the Associated General Contractors of America, Inc. (AGC); U.S. Home Care Company; and American Health Care Association et al.

[3] The AFL–CIO; AGC; Chamber of Commerce; U.S. Home Care Corporation; and American Health Care Association et al.

challenged ballot procedures for the disputed employees, but the Employer opposed it. The Employer stated that the number of persons involved, approximately 8 to 9 percent of the bargaining unit, was larger than the Employer ''would care to vote under challenge.'' The Employer also contended that the conduct of the leaders could affect the results of the election, and the Employer wanted the issue settled.

Pursuant to the Regional Director's instructions, the hearing officer ruled that the supervisory status of the 24 line and group leaders would not be litigated at the hearing. Rather, because there were no other disputed issues and because he saw this as a means of avoiding delay and expense, the hearing officer declared that a Decision and Direction of Election would issue permitting the line leaders and group leaders to vote subject to challenge.[4]

The Employer objected to this procedure. The Employer argued that it was entitled to a determination on the supervisory status of these individuals, and that the Employer's evidence would demonstrate that status. Although the Employer was present with its witnesses and prepared to put on evidence in support of its contentions, the hearing officer limited the Employer to an offer of proof on the record.[5] Having obtained agreement on all other issues, the hearing officer closed the hearing without any testimony being received. The Employer supplemented its offer of proof in its posthearing brief to the Regional Director.[6]

The Employer has stated in its briefs and at oral argument before the Board that following the issuance of the Decision and Direction of Election (which included the provision for the line leaders and group leaders to cast votes subject to challenge), the Employer instructed its line leaders and group leaders not to vote in the election because it regarded them as supervisors. No other party has disputed that statement, and agency records disclose that none of the persons identified as line leaders and group leaders voted.

II. DISCUSSION

Section 9(c)(1) of the Act provides for an appropriate preelection hearing when a petition is filed seeking a representation election, if the Board upon investigation has reasonable cause to believe that a question concerning representation affecting commerce exists. *Angelica Healthcare Services Group*, supra. Section 102.66(a) of the Board's Rules and Section 101.20(c) of the Board's Statements of Procedure[7] entitle parties at such hearings to present witnesses and documentary evidence in support of their positions. See also Section 102.64(a) of the Board's Rules.[8]

Under all the circumstances, the preelection hearing held in this case did not meet the requirements of the Act and the Board's Rules and Statements of Procedure. The Regional Director therefore committed error in curtailing the hearing as he did.[9] This conclusion does not, however, necessarily resolve what is the best course to follow now, given the Employer's elimination of all but one of the earlier contested positions

[4] There is no evidence or contention that the refusal of the Region to allow the Employer to litigate the leaders' supervisory status was based on any propensity by the Employer or its attorney to make frivolous claims to delay the election.

[5] In its offer of proof, the Employer asserted that its personnel director and representative line and group leaders would testify that line leaders and group leaders responsibly direct 6 to 10 employees each; complete employee evaluations; make effective recommendations of disciplinary action; are paid significantly more than hourly employees; and are involved in the hiring process and participate in reassignments of employees. The Employer further asserted that if the leaders were not found to be supervisors, there would be a 35 to 1 ratio of employees to supervisors.

[6] The Employer provided documents dealing with supervisory training received by leaders; hiring, firing, and promotional decisions in which leaders were involved; leaders' authority to transfer, assign, discipline, and responsibly direct employees, and to adjust their grievances; evaluations of employees and recommendations for merit pay raises completed by leaders; and pay scales. In addition, the Employer noted that in 1992, in Case 5–RC–13713 involving the Employer and the Amalgamated Clothing and Textile Workers Union, line leaders and group leaders were excluded as supervisors from the bargaining unit by agreement of the parties.

[7] Sec. 102.66(a) provides, inter alia:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence.

Sec. 101.20(c) provides, inter alia:

> The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.

[8] Sec. 102.64(a) provides, inter alia:

> It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under section 9(c) of the Act.

[9] This conclusion is based on the facts of this case. We do not express a view as to whether a different result would be warranted if one or more of those facts were different.

We also note that our ruling concerns only the entitlement to a preelection hearing, which is a matter distinct from any claim of entitlement to a final agency decision on any issue raised in such a hearing. We note that reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election, although in some circumstances the size and character of the group of individuals whose status is left unresolved may be deemed a basis for invalidating the election. Compare, e.g., *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436–1437 (8th Cir. 1994) (no abuse of discretion in deferring decision on voting eligibility of laid-off employees); *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1443 (9th Cir. 1983) (same respecting several alleged supervisors), and *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772, 776 (9th Cir. 1973), with *NLRB v. Parsons School of Design*, 793 F.2d 503, 507–508 (2d Cir. 1986) (election critically impaired where postelection modification of college instructor unit removed all the fulltime instructors and thereby ''significantly altered'' its ''character and scope''); *NLRB v. Lorimar Productions*, 771 F.2d 1294, 1302 (9th Cir. 1985) (same result where vote was close and Board's postelection removal of one out of only two job classifications in the unit meant that the ''ultimate unit certified . . . differed substantially in size and nature from the unit voted upon'').

and given the nature of the Employer's arguments about the Regional Director's error. In its October 14 letter to the Board, the Employer urges that the erroneous denial of an appropriate preelection hearing ''seriously prejudiced the Company, tainted the preelection period and invalidated the May 6 election.'' In our view, these arguments can be appropriately made in the form of objections to the election, if the Regional Director issues a tally of ballots or certification with which the Employer wishes to take issue.[10] We are not hereby inviting Regional Directors to engage in erroneous denials of hearings and then relegate parties to postelection processes. It is simply that in the present posture of this case, and given the nature of the Employer's arguments, it seems most likely to effectuate the purposes of the Act to entertain those claims of prejudice as election objections, should the Employer wish to raise them after the election outcome is revealed.[11]

Accordingly, the Regional Director's affirmance of the hearing officer's refusal to permit the Employer to introduce testimony at the preelection hearing is reversed, but the case is remanded to the Regional Director for the purpose of opening and counting the ballots and taking appropriate action thereafter.[12] The arguments raised by the Employer concerning prejudice resulting from the denial of the hearing may be considered upon the timely filing of appropriate objections.

ORDER

IT IS HEREBY ORDERED that the case is remanded to the Regional Director for Region 5 to open and count the ballots and take appropriate action thereafter.

MEMBER STEPHENS, concurring.

As my dissenting colleague correctly observes, I voted with him to stay the election in this case. Had that position prevailed, we undoubtedly would have remanded this case for a preelection hearing as we did in *Angelica Healthcare Services Group*, 315 NLRB 1320 (1995). That position did not prevail, however; the election was held and certain other events occurred that place this case in a significantly different posture. We are now faced with three options: (1) set the election aside and remand for a hearing which, because of intervening events, would involve the question whether one individual is a supervisor; (2) determine whether the Regional Director's error in not permitting the Employer to put on the testimony of its witnesses turned out to be in some way harmless; or (3) without setting the election aside, remand so as to permit the Employer (assuming it desires to contest the election results) to present its arguments of prejudice in the form of an election objection. After carefully considering all these options, under the peculiar facts of this case, I favor the third option and therefore join my colleagues in the majority.

In so doing, I first note that the Employer is not attacking the challenge procedure generally, i.e., it is not putting in issue whether Section 9(c) requires not only a preelection hearing in all appropriate cases but also a *determination* on each and every issue prior to an election.[1] Rather, the Employer argues that, in foreclosing it from putting on its witnesses at the scheduled hearing, the Regional Director erroneously relied on cases in which, although the ballot challenge procedure was employed because of unresolved voter eligibility issues, the parties had in fact received a preelection hearing on all those issues.

The Employer does also argue that an employer may, in some cases, be prejudiced, and the election process compromised, by a failure to determine whether individuals otherwise within the voting unit should be excluded as supervisors within the meaning of Section 2(11). Specifically, it argues that, if the individuals are in fact found to be supervisors, then the employer will be able to demand their loyalty to its interests in the election campaign, prevent them from coercing employees whom they supervise with respect to the election, and prevent them from voting; and if the individuals are found *not* to be supervisors, then the employer will be on notice to allow them freedom to participate on either side in the union campaign, like all other unit employees. We know, from statements in the Employer's postargument brief, that it acted on the premise that the group leaders and line leaders were supervisors; and it accordingly instructed them to refrain from engaging in union activities and successfully prevented them from voting in the election.[2]

[10] We recognize that such objections could lead to litigation of the unresolved supervisory issue, but we also recognize the possibility that, if no objections are filed, the case could be closed without such a hearing. In any event, we fail to see how, as our dissenting colleague contends, our decision will cause ''more litigation and confusion'' than would his position to set aside the election, hold a preelection hearing on the supervisory issue, and conduct a new election.

[11] Cf. *Vitek Electronics, Inc. v. NLRB*, 763 F.2d 561, 569 (3d Cir. 1985) (although Board erred in the procedures it used for deciding remanded objection, it would disserve ''the policy of the Act'' and contribute ''little to the resolution of the controversy'' to remand for the type of hearing the court had originally mandated).

[12] We are unaware whether any challenged ballots were cast, and, of course, cannot know whether any of the ballots cast may subsequently be challenged as void. If there are any such ballots raising issues for hearing and they are potentially determinative in number, the Regional Director can issue a supplemental decision in which the challenge issues can be consolidated for hearing with any appropriate objections that are filed.

[1] See Employer's Request for Review. Thus, we cannot know, if it were to make such an argument, whether the Employer would also contend that it was entitled to a determination of supervisory status at some minimum number of days before an election.

[2] We also know that because of the Employer's postelection elimination of most of the line leader and group leader positions, any ex-

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Because the Employer does not identify—or argue that it possesses—any statutory right to a determination on employee status before a Board election, the arguments it is making are arguments about interference with the election process which are akin to supervisory taint contentions that are commonly considered in the objections phase. I agree with my colleagues that events have moved us to a point at which it makes the most sense to consider those arguments as election objections, should the Employer wish to contest the election outcome.

I wish to emphasize, however, that I would not necessarily take the same position in the case of any future denials of preelection hearings. At the time the Regional Director took the action he did in this case, however, he did not have the benefit of our decision in *Angelica.* His action constituted error because, in my view, the statute—even apart from our implementing rules and regulations—entitles parties to preelection testimonial hearings. But it was not an error committed in the face of a clear direction from the Board, and I agree with my colleagues that proceeding to a tally of ballots is the most practical step in this case under the circumstances.

MEMBER COHEN, dissenting.

My colleagues concede, as they must, that the Regional Director violated the procedures of the Act, as well as the Rules of the Board, by not permitting the Employer to adduce evidence on the issue of supervisory status. However, my colleagues refuse to take the obvious next step. They refuse to order the Regional Director to return to the status quo ante the error. Because my colleagues are unwilling to take this simple but necessary step, I respectfully dissent.

As noted, the Regional Director deprived the Employer of an appropriate hearing. Faced with that clear error, the Board should have ordered a hearing and vacated the Direction of Election. Member Stephens and I voted to follow this course. Our colleagues took the contrary view, and their votes carried the day.

The decision to proceed with the election, notwithstanding the procedural error, left the wronged Employer on the horns of a difficult dilemma. The Employer could act on the premise that the persons were supervisors, i.e., it could use these persons in its campaign, instruct them not to engage in union activity, and instruct them not to vote. However, if it were wrong, the conduct would effectively trounce upon the Section 7 rights of employees. Such conduct could be found unlawful and objectionable. Alternatively, the Employer could act on the premise that the persons were employees, i.e., it could refrain from using those persons in the campaign, and permit them to engage in union activities and to vote. However, if these persons turned out to be supervisors, any prounion activity by them might be unlawful and objectionable. In addition, the Employer would be deprived of its right to campaign through its agents.[1]

In light of the clear procedural error, and the difficulties that the error posed for the Employer, it was simply wrong for the Board to proceed with the election. The Board today compounds the wrong. My colleagues order that the votes be tallied, again in the face of an uncorrected procedural error. It is clear that this course will only cause more litigation and confusion. If the Union loses the election, it can be expected to file objections on the basis that the persons in dispute were employees and that the Employer prevented them from campaigning and voting. If the Union wins the election, the Employer can be expected to object that the persons may be employees who should have been permitted to campaign and vote.[2] Perhaps more importantly, either party can argue that, because of the Board's procedural errors, the electorate was confused about the proper composition of the unit, thereby destroying the laboratory conditions.

In my view, it is highly likely that these objections would be meritorious. But quite apart from that, it is at least clear that the objections will entail additional litigation and confusion. All of this litigation and confusion can and should be avoided. The simple fact is that the Regional Director erred, and the even simpler fact is that the Board should now correct the error. The Board should go back to the point at which the error occurred, and it should require the Regional Director to proceed appropriately from that point.[3]

Finally, I wish to make clear my position on matters discussed in footnote 9 of my colleagues' decision. As made plain in Section 9(c), the Board cannot direct an election without an appropriate hearing. Concededly, there may be cases where, *after such a hearing*, the Regional Director or the Board can defer ruling on the eligibility of a small number of employees, leaving the

press preelection exclusion of these individuals from the unit on the basis of supervisory status might have been misleading to employees as to which *individuals* would end up within the bargaining unit if the Union were certified as the representative.

[1] We now know that the Employer chose the former course. As explained below, the consequences of that choice are unresolved by my colleagues.

[2] The Union might argue that the Employer is estopped from making this argument. However, it would be difficult to apply the equitable doctrine of estoppel against a party who sought to have the status issue resolved and was improperly forbidden from doing so.

[3] Because of postelection changes, it appears that only one disputed position remains. However, I fail to see how this postelection fact obviates the necessity for correcting the preelection error.

It may be that the parties can agree to a challenge of the one remaining position in dispute. If not, after an appropriate hearing, the Regional Director and the Board could decline to pass on the status of the one position in dispute, preferring to allow the matter to be resolved by challenge. But, to repeat, that would be *after* a hearing, and it would involve a challenge as to only one position.

eligibility issue for the challenge process. However, I do not think it permissible or prudent to defer ruling on such basic matters as appropriateness of the unit. In addition, it is at least imprudent to defer ruling on eligibility issues involving a substantial number of persons. In my view, employees should not be forced to vote on the important issue of representation if they do not know who will or will not be joined with them in their unit. That is fundamentally unfair to the employees. In addition, if the eligibility issue is one of supervisory status, a failure to rule on the issue is a refusal to recognize the employer's legitimate interest in ascertaining, prior to the election, which persons are part of management and which are not. That is fundamentally unfair to the employer.